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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARTURO VELIZ CORTEZ, Defendant and Appellant.	H041081 (Santa Clara County Super. Ct. No. C1247520)

The prosecution accused defendant Arturo Veliz Cortez of sexually molesting both his girlfriend's young daughter and granddaughter. A jury found Cortez guilty on multiple counts of aggravated sexual assault and lewd or lascivious acts upon a child. The jury also found Cortez committed lewd or lascivious acts on more than one victim. The trial court imposed an aggregate term of 105 years to life consecutive to three years in prison.

Cortez raises numerous claims on appeal. Among other claims, he challenges the admission of his confession; the admission of hearsay statements and testimony by one of the complaining witnesses; and the joinder of the charges involving the two victims. He further claims he suffered ineffective assistance of counsel in several regards.

We conclude Cortez's claims are meritless. Finding no reversible error, we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offenses*

The prosecution charged Cortez, a 43-year-old man, with sexually molesting two young girls: J., beginning at age 8 or 9, and her niece N., at age 4. At the time, Cortez was living with his girlfriend, Irma A. J. is Irma's daughter. N. is the daughter of Maria A., who is Irma's daughter and J.'s older half-sister.

Police began their investigation in November 2012, after N. told Maria that Cortez had touched her at a birthday party. In the course of the investigation, J., then 11 years old, told police Cortez had molested her multiple times over the course of several years while he was living with her and Irma.

1. *Lewd or Lascivious Act on N.*[1]

On November 18, 2012, Maria and her husband, David C., took N. to a family member's birthday party at Irma's apartment in San Jose. Maria and her husband left N. at the party while they went shopping. After about two and a half hours, they returned to the party. Cortez, who was at the party, was drinking beer and appeared to be "buzzed." After spending about three more hours at the party, Maria and her husband left with N.

As the family was walking to their car, N. pointed to her buttocks and said, "Owie." In the past, N. had used this expression when she had not sufficiently wiped herself after using the bathroom, so Maria asked her if she had wiped herself properly. N. said "yes" and the family kept walking. N. then said "owie" again, whereupon Maria asked her if anybody had touched her. N. stated that "Tata" had touched her, referring to Cortez. Maria told N. not to lie, and N. denied lying. N. said Cortez had grabbed the television remote control away from her and touched her "torta," the term she used to refer to her vagina. She gestured with her hand by placing it on her vagina and moving

[1] The prosecution introduced most of the facts presented in this section through the testimony of N.'s parents. We discuss N.'s trial testimony below.

her hand back and forth three times. At that point, Maria decided to go back to the party with her husband and N. to confront Cortez.

When they arrived back at Irma's apartment, Maria called Irma and asked her to come outside. When Irma came outside, Maria told N. to tell Irma what happened. N. said, "Tata touched me," and she pointed to her vagina. Irma said she had not seen anything happen. She stated that N. had not been by herself, and that N. had been with Irma or J. the entire time.

Maria then took N. into Irma's apartment. N.'s father, who was angry and upset, stayed outside. Once inside, Maria took N. to a bathroom where Maria removed N.'s underwear and examined her physically. Maria did not see any redness or bleeding.

After examining N. for about ten minutes, Maria took her to confront Cortez. When Maria asked Cortez what happened, he responded, "What do you mean?" N. immediately stated, "Tata, you touched me." Cortez denied doing so, whereupon N. repeated the accusation and gestured toward her vagina. Cortez again denied touching N. Maria and N. then left the apartment and returned home. Maria did not call the police that day.

The next morning, N. told Maria, "Mommy, do you remember Tata touched me?" Maria called the police that afternoon. A police officer arrived and interviewed N. together with Maria and her husband. In talking to the police officer, N. changed her explanation of what happened. At first, N. claimed the touching happened in the bedroom. She then stated it happened in the living room. She then said it happened in the kitchen. She stated Cortez touched her over her clothing.

N. was five years old when she testified at trial.[2] Using a stuffed hippopotamus doll, she indicated Cortez touched her between the legs. She testified that Cortez touched her "torta" under her clothing while they were in the bedroom at Irma's home.

[2] N.'s trial testimony is discussed in more detail in Section II.C below.

2. *Sexual Assaults Upon J.*

J. was 12 years old at the time of trial. She testified as follows. Cortez began dating Irma when J. was in elementary school. At some point, Cortez moved into Irma's home in San Jose. J. and several other relatives lived there at the same time.

The first touching incident occurred when J. was lying on a bed in her mother's bedroom watching television. Cortez entered the room, pulled up a chair, and sat next to the bed. He then reached out, touched J.'s leg, and moved his hand up her leg. J. thought it was an accident because Cortez had been drinking.

J. described another incident involving the family dog's food bowl. J. went to her mother's bedroom to look for the bowl and saw Cortez in the room. He told J. to look under the bed for the bowl. When she did so, he put his hand on her buttocks. She asked him whether he touched her on purpose; Cortez claimed it was an accident.

The touching incidents continued to happen. Cortez touched J. on her vagina and breasts, both over and under her clothes, and inside her vagina. On one occasion, J. was taking a nap with a blanket in her bedroom when Cortez came in. Cortez got on the bed and covered himself with the same blanket. J. then took the blanket off herself and told him she did not feel comfortable. He hugged her and touched her vagina over her shorts. J. struggled to wiggle away and was eventually able to get out of the bed.

J. testified about several incidents involving vaginal penetration. In one incident, she was lying on her bed trying to fall asleep with headphones on. Cortez entered the room and lay on top of her. He touched her breast area with one hand and put his other hand on her vagina under her clothes. He then squeezed her breasts and inserted his fingers into her vagina, causing her pain. J. struggled to get out from under him and hit him in the stomach, whereupon he got off her and she ran outside.

On another occasion, J. was at the swimming pool in the apartment complex where she lived, wearing a swimsuit. She went back to her apartment to change out of her swimsuit. After she put on her clothes, Cortez entered the bedroom and got on top of

her on the bed. He put his penis inside her against her will, causing her pain. When he was finished, he told J. it was "our little secret." When she went to the bathroom, a white liquid came out of her.

Another act of sexual intercourse occurred around the time J.'s mother lost her job at the HP Pavilion. J. was in her bedroom at night when she awoke to find Cortez on top of her. She had gone to bed wearing pants or underwear, but they were no longer on her. Cortez was moving up and down with his penis inside her. She struggled against him, but he did not stop. Later, when J. went to the bathroom, she again saw the white liquid come out of her.

J. also described an incident when Cortez grabbed her hand and put it on his penis while they were sitting on the couch together. Cortez used force to accomplish the act; J. did not touch him voluntarily. This happened two or three other times.

At some point, J. told Maria, her older sister, that Cortez had touched her. Maria told J. to tell Irma, but J. felt too uncomfortable about it to tell Irma. After Maria told Irma what J. had said, Irma questioned J. but did not believe her. Irma once questioned J. about it in front of Cortez, and he denied touching her. Irma continued to question J. about her claims, so J. eventually changed her response and claimed it was all a joke. Irma then grounded J. for lying.

In November 2012, shortly after N. accused Cortez of touching her at the birthday party, Maria told J. about N.'s accusation. In response, J. decided to reassert her allegations against Cortez. She testified, "now I felt that they would have to believe me [. . .] [b]ecause I wasn't the only one that had experienced that." Accordingly, J. again told Maria that Cortez had been molesting her. J. thought Maria believed her this time.

In her testimony, J. admitted she had previously made an allegation of sexual assault against another one of Irma's former boyfriends. She admitted she had testified at the preliminary hearing that the allegation was false. In her trial testimony, however, she

testified that the boyfriend had in fact touched her thighs and legs, but she was unsure whether it was "a good touch" or "a bad touch."

3. *Subsequent Events*

After Maria contacted the police about N.'s claims, J. also made statements to the police. J. initially told the police Cortez touched her inappropriately on two occasions, and that the touching occurred over her clothes.

The police arranged for Maria to conduct a pretext phone call to Cortez. Cortez denied touching N., but he stated that she was in the bedroom with him. He said he told N. to close the door on her way out of the room and he threatened to hit her if she did not do so. Cortez denied touching J.

The police also arranged for Maria to make a pretext call to J. In the call, J. told Maria there were only two incidents with Cortez. J. said one of the touchings occurred over a blanket while she was lying down watching television. She said the other incident involved an attempt to touch her, but that Cortez did not succeed. She did not say Cortez had put his fingers or penis in her vagina. However, J. also said she did not want to talk on the phone because Cortez and Irma were nearby.

In December 2012, San Jose Police Officer Emilio Perez attempted to arrange a follow-up meeting with N. and her family. After several unsuccessful attempts, Officer Perez contacted Maria and arranged to interview N. at the Children's Interview Center on December 26, 2012. At trial, the prosecution played a videotape of the interview for the jury.[3]

After N.'s interview at the Children's Interview Center, Officer Perez spoke with J. J. described approximately nine different incidents involving various types of touching by Cortez. She told Officer Perez that Cortez had put his penis in her vagina two to three times, and he had put his fingers in her vagina around five to six times. She described

[3] The interview is discussed in detail in Section II.B below.

one incident in which Cortez got on top of her and put his body weight on her while she was lying on her mother's bed.

On the same day as J.'s interview with Officer Perez, she also spoke with a social worker. She told the social worker the touchings were occurring every other day.

J. underwent a Sexual Assault Response Team (SART) exam on December 27, 2012. The exam revealed no evidence of trauma. The examining SART nurse testified that this did not show an absence of prior sexual contact because enough time had passed for any trauma to heal.

Police interviewed Cortez at the San Jose Police Department on the same day—December 27, 2012.[4] After he initially denied touching J. or N. inappropriately, Cortez admitted molesting J. He admitted he had inserted both his fingers and his penis into her vagina on multiple occasions. He continued to deny molesting N. Police then took Cortez into custody.

On December 30, 2012, Cortez made five phone calls to Irma from the county jail. Cortez told Irma, "They need to go do what they need to do. [¶] Both need to be there tomorrow at 1:00."[5] Cortez told Irma "they" needed to go to court and that "if they say that well it will help me." Irma promised Cortez she would help him. Cortez added, "Both of them have to go and say that." Referencing J., Cortez later said, "Let's see why she doesn't go—why doesn't she go to the also to the fucking court and also tell what she lied about; . . . hey you know what I lied, he didn't do anything to me, he didn't do anything because I lied. Why is she doing this." He added, "They have to see that it's just that she has to say that it is not true. That they pressured her."

The next day, the trial court arraigned Cortez. A woman who identified herself as the "victim's mother" went to the hearing, approached a deputy district attorney, and told

[4] The details of the interview are discussed in Section II.A below.

[5] The phone calls took place in Spanish. The quotes are from the English translation of the transcript.

her that "it was all a misunderstanding, that the girls were pressured to make the statements that they did."

On January 4, 2013, Irma, Maria, N. and J. went to the San Jose Police Department to see Officer Perez. Maria told Officer Perez that N. and J. wanted to speak with him. Officer Perez took J. aside and spoke with her alone. She appeared upset and she was reluctant to speak. Officer Perez asked her if she had been telling him the truth, and she nodded in response. (In her trial testimony about this meeting, J. stated that she told Officer Perez everything was a lie, but she testified that in fact she had been telling the truth.)

Officer Perez, the social worker, and the prosecutor visited J. at her home on January 9, 2013. Irma was present but in another room when the social worker interviewed J. J. recanted her accusations and told the social worker that everything she had told the police was a lie. She said she had lied because she did not like Cortez and wanted to get him out of the house. She also said Cortez was only playing games with her and did not intend to touch her. She stated that she had been confused about the location of her vagina. However, at some point in the interview, J. whispered that Cortez had in fact been touching her. In her testimony about the interview, J. stated that she told the social worker she had been lying because she felt bad for Irma.

The prosecutor then spoke with J. and told her the case was going to go forward regardless of what J. had said. The prosecutor said she herself would be "the bad guy" and that she would not tell Irma what J. said. At that point, J. said she had not been lying.

J. was subsequently removed from her home and taken into protective custody.

B. *Procedural Background*

The prosecution charged Cortez with eight counts: Counts One and Two—Aggravated sexual assault (rape) of a child (J.) under 14 years of age and seven or more

years younger than defendant (Pen. Code, §§ 261, subd. (a), 269)[6]; Counts Three and Four—Aggravated sexual assault (sexual penetration) of a child (J.) under 14 years of age and seven or more years younger than defendant (§§ 269, 289, subd. (a)); Counts Five and Six—Lewd or lascivious act on a child (J.) by force (§ 288, subd. (b)(1)); Count Seven—Lewd or lascivious act on a child (N.) under 14 years of age (§ 288, subd. (a)); and Count Eight—Attempting to dissuade a witness or victim (J.) (§ 136.1, subd. (a)). As to Counts Five through Seven, the prosecution alleged Cortez committed lewd or lascivious acts against more than one victim. (§ 667.61, subds. (b) & (e).)

At trial, the jury found defendant guilty on all eight counts and found true the multiple victim allegations. The trial court sentenced defendant to an aggregate term of 105 years to life consecutive to three years. The term consisted of seven consecutive terms of 15 years to life for Counts One through Seven, consecutive to the upper term of three years for Count Eight.

II. DISCUSSION

A. *Admission of Defendant's Confession*

Cortez contends the trial court erred in denying his motion to suppress his pretrial statements to police. He contends police improperly used deceptive tactics and implicit promises to interrogate him, rendering his confession involuntary and violating his federal due process rights. The Attorney General contends Cortez's statements were voluntary and properly admitted. We conclude Cortez confessed voluntarily and we find no error in admitting his statements.

1. *Factual and Procedural Background*

Officer Perez interviewed Cortez in one of the interview rooms at the San Jose Police Department's Sexual Assault Investigation Unit on December 27, 2012. By that time, the police had already interviewed N. and J. in detail. Officer Perez called Cortez

[6] Subsequent undesignated statutory references are to the Penal Code.

and informed him police wanted to talk with him at the police department. Cortez went to the police department on his own volition. When he arrived, the police did not place him under arrest, handcuff him, or tell him he could not leave. Officer Perez was the sole questioner, and he did so almost entirely in Spanish. The interview was about 70 minutes long and was recorded on video with audio.

At the start of the interview, Officer Perez questioned Cortez about various biographical facts. When asked his date of birth, Cortez provided an incorrect date. Officer Perez then fully advised Cortez of his rights under *Miranda*[7] and Cortez acknowledged he understood them. Cortez then continued to answer Officer Perez's questions. The two men appeared relaxed and casual throughout the interview. Officer Perez maintained a normal tone of voice and did not appear verbally or physically aggressive at any time.

Cortez told Officer Perez he did not know why police wanted to question him. Officer Perez told Cortez "there are some allegations against you" and "there's a lot of evidence in this case."[8] Officer Perez admonished Cortez to tell the truth and warned him against lying. Officer Perez then raised N.'s allegations concerning the incident at the birthday party. Cortez repeatedly denied touching N. He said he was in his bedroom watching television when N. came in, and he threatened to hit her, whereupon she left. Officer Perez asked if Cortez was drunk at the time, but Cortez denied he was.

Officer Perez then questioned Cortez about J.'s allegations, again warning him that "there's a lot of evidence against you." Officer Perez said J. had been examined by a doctor who conducted a SART exam on her. Officer Perez said they collected her clothes and took DNA samples from them. Cortez initially denied touching J. At that point, Officer Perez told Cortez he was going to collect DNA samples from him. They took

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436.

[8] All quotations from this interview are taken from the English translation of the transcript.

several breaks while Officer Perez, with Cortez's consent, swabbed his mouth with Q-Tips. Officer Perez then left briefly with the samples.

Upon his return, Officer Perez told Cortez the samples would be sent to a laboratory, and that someone would report back 15 minutes later on whether Cortez's DNA had been found on J.'s clothes or body. Officer Perez then resumed his questioning of Cortez. Officer Perez admonished him not to lie and told him, "you have to talk with the truth because everything that you're saying here, the District Attorney will review it." Officer Perez explained that everything Cortez said would be reported to the district attorney, who "sees the report and he decides what's going to happen." He added that the district attorney would decide if "Arturo [would] end up in jail or the charges can go [if he] doesn't have enough evidence." Officer Perez emphasized that if Cortez was lying, that would "look bad," and he admonished Cortez again to tell the truth. Cortez claimed he had told the truth.

Officer Perez then told Cortez the doctor would be able to tell if Cortez had molested J. When Cortez again denied touching her, Officer Perez responded, "Yes it did happen because . . . because we have the evidence. Okay so you still insist that no, no, and that no . . . that no, that no . . . is not good . . . 'Cause it did happen, we have evidence, your fingerprints. We already have it for a long time."

After further questioning, Cortez began to allow that he may have touched J. At first, he explained that it happened when they were "playing." He stated that he did not want to touch her, but added, "When we were playing . . . yes, yes I touched her." He explained that he would throw her on the bed and his hand would touch her vagina, but he claimed he only touched her over her clothes. He then allowed that his finger may have gone into her vagina on two occasions when they were playing.

When Officer Perez asked if Cortez had put his penis in J., he initially denied it. After Officer Perez told him J. had seen semen inside her, Cortez admitted he may have penetrated J. once. Cortez defended himself, stating, "she always wanted to do it." He

said she always wanted to caress him, grab him, and kiss him, and that "she always grabbed my parts." He said she would take off her clothes, that she would try to take off his shorts, and that "sometimes she would go on top of me." He maintained he only put his penis in her one time, and that he did not want to do so. However, he continued to deny he had molested N.

At the end of the interview, Officer Perez suggested that Cortez write a letter of apology or confession. Cortez agreed to do so and wrote four letters in Spanish—one each to J., N., Irma, and the judge. The letters to J. and Irma were "general apology" letters asking for forgiveness and blaming his unspecified conduct on his alcoholism. His letter to N. asked her to forgive him. He wrote that he wanted her and her parents to know "he would never do anything like that to her." His letter to the judge expressed regret for his conduct and stated, "I don't know how I could do this."

In his in limine motions, Cortez challenged the admissibility of the above statements and requested a hearing under Evidence Code section 402. The trial court held a pretrial hearing on the matter at which Officer Perez testified. Officer Perez testified that he did not offer Cortez any deal with the district attorney or offer to talk to the judge on Cortez's behalf. Officer Perez admitted to using multiple "ruses" in which he told Cortez there was or would be evidence implicating him when in fact there was no such evidence. For example, Officer Perez admitted that his use of the purported DNA testing was a "ruse" and that in fact there was no DNA evidence implicating Cortez. He also admitted his assertion of fingerprint evidence was false.

The court found no constitutional violations from the interrogation and denied the motion to suppress.

2. *Legal Principles*

Any involuntary statement obtained by a law enforcement officer from a criminal suspect through coercion is inadmissible under the federal Constitution. (*People v. Dykes* (2009) 46 Cal.4th 731, 752 (*Dykes*).) The prosecution bears the burden of showing by a

preponderance of the evidence that the defendant's statement was voluntary. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176 (*Linton*).) The fundamental test for voluntariness is whether the "defendant's will was overborne" by the circumstances surrounding the taking of the statement. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *Dickerson v. U.S.* (2000) 530 U.S. 428, 434 (*Dickerson*); *People v. McWhorter* (2009) 47 Cal.4th 318, 346 (*McWhorter*).) "The due process test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.' " (*Dickerson*, *supra*, 530 U.S. at p. 434, quoting *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226.)

" 'A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]' [Citation]." (*McWhorter*, *supra*, 47 Cal.4th at p. 347.) The test depends on both the characteristics of the defendant and the external circumstances of the interrogation. "The determination 'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.' " (*Dickerson*, *supra*, 530 U.S. at p. 434, quoting *Stein v. People of State of New York* (1953) 346 U.S. 156, 185.)

"[T]he trial court's legal conclusion as to the voluntariness of a confession is subject to independent review on appeal. [Citations.] The trial court's resolution of disputed facts and inferences, its evaluation of credibility, and its findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. [Citations.]." (*Dykes*, *supra*, 46 Cal.4th at p. 753.) "The facts surrounding an admission or confession are undisputed to the extent the interview is tape-recorded,

making the issue subject to our independent review. [Citation.]" (*Linton, supra*, 56 Cal.4th at p. 1177.)

3. *The Trial Court Did Not Err in Denying the Motion to Suppress*

Cortez puts forth several factors to support his claim the statement was involuntary. First, he asserts the officer made implied threats by telling Cortez a report would be made to the district attorney and it would "look bad" if Cortez continued to lie. Generally, "[m]ere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise . . . does not . . . make a subsequent confession involuntary." (*People v. Boyde* (1988) 46 Cal.3d 212, 238, overruled on other grounds by *People v. Johnson* (2016) 62 Cal.4th 600.) "However, where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law." (*Ibid.*) In this instance, the officer's statements were not expressly tied to any promise of leniency or threat of prosecution. To the extent the officer made some implied threat, it was not "clearly implied," but vague and nonspecific. We think the officer's statements, viewed in isolation, were not connected to any specific outcome with a level of certainty sufficient to render Cortez's statements involuntary. Under the totality of the circumstances, however, we agree with Cortez that this tactic weighs against a finding of voluntariness.

Second, Cortez points to the custodial nature of the interrogation. "[C]ustodial police interrogation, by its very nature, isolates and pressures the individual." (*Dickerson, supra*, 530 U.S. at p. 435.) Although the interview took place at an interview room in a police station, Cortez was subjected to no other physical constraints during the interview. He voluntarily transported himself to the station, and he was not handcuffed, nor told he was under arrest at any time before or during the interview. The officer was not physically aggressive or verbally assaultive. In our review of the video, we see

nothing in Cortez's appearance showing he experienced discomfort or undue pressure at any point in the interview.

Third, Cortez points to the officer's use of deceptive tactics in the form of several "ruses"—e.g., the officer's claim that DNA evidence, fingerprints, and a medical examination of the victim proved Cortez had touched or molested J. As a general matter, an officer's use of deceptive tactics does not by itself render a defendant's statements involuntary. "Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is ' " 'of a type reasonably likely to procure an untrue statement.' " ' [Citations.] ' "The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." ' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 443.) However, the use of deception is one factor weighing against a finding of voluntariness. "While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness [citations]." (*People v. Hogan* (1982) 31 Cal.3d 815, 840-841, disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) We note that at least one federal district court has granted a writ of habeas corpus in a case involving an interrogation utilizing tactics nearly identical to those used here. (*Campos v. Stone* (N. Cal., Aug. 22, 2016, No. 15-CV-04298-VC) __F.Supp.3d__ [2016 WL 4426964].) (See also *In re Elias V.* (2015) 237 Cal.App.4th 568, 584 [studies demonstrate that the use of false evidence enhances the risk of false confessions].) Accordingly, we agree with Cortez that this factor weighs in his favor.

Fourth, Cortez asserts the officer used "minimization" tactics designed to play down the moral seriousness of the offense. "The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an

elaboration of what the police purport to know already—that he is guilty." (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 450.) (See also *In re Elias V.*, *supra*, 237 Cal.App.4th at p. 583, quoting Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations* (2010) 34 Law & Hum. Behav. 3 [minimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question].) For example, at several points in the interview, the officer suggested Cortez may have been drunk when he molested the victim. Along the same lines, the officer referenced the victim's physical appearance and conduct, suggested she was also guilty and implying Cortez may have lost control of himself. The use of these tactics also weighs against a finding of voluntariness.

Under the totality of the circumstances, however, a consideration of all relevant factors compels a finding of voluntariness. As noted above, there was nothing particularly coercive about the conditions of the interview. Although the interview took place at the police station, Cortez went on his own volition, and he was not handcuffed, restrained, nor told he was under arrest. He was interviewed by only one officer, and their interactions were calm and measured at all times. The officer fully advised Cortez of his *Miranda* rights, and he affirmatively acknowledged them. At 70 minutes in duration, the interrogation was not unduly long.

Moreover, nothing about Cortez's personal characteristics suggests he was vulnerable to coercion. Although Cortez's opening brief refers to his "lack of sophistication," he cites to nothing in the record concerning his mental abilities, his intelligence, or his level of education.[9] Cortez was 43 years old at the time, and there is no evidence he was psychologically immature, vulnerable, or naive. To the contrary, the

[9] At oral argument, counsel for Cortez cited two exchanges between Cortez and Officer Perez that purportedly showed Cortez was unsophisticated. Our examination of the record does not support that conclusion.

record shows Cortez had suffered multiple prior misdemeanor convictions, suggesting he had previous experience interacting with law enforcement.

Finally, our review of the video reveals no objective appearance of coercion, neither in Cortez's physical appearance nor in the officer's conduct. For all these reasons, we conclude the confession was voluntary and the trial court did not err in denying the motion to suppress Cortez's statements to police.

B. *Admission of N.'s Videotaped Interview at the Children's Interview Center*

Cortez contends the trial court erred by admitting N.'s videotaped statement to police. He challenges the ruling on two grounds. First, he contends N. was not a competent witness because she did not understand her obligation to tell the truth and she was incapable of making herself understood. Second, he contends there were insufficient indicia that her statement was reliable under Evidence Code section 1360. He argues that admission of the statement violated his due process rights. The Attorney General contends N. was competent to testify, and that admission of the statement was harmless in any event. We conclude the court did not abuse its discretion and admission of the statement did not violate due process.

1. *Factual and Procedural Background*

Officer Perez interviewed N. for about 40 minutes in an interview room at the Children's Interview Center. N. was four years old at the time. Most of the interview was conducted in English, but several exchanges took place in Spanish. It was recorded on video with audio.

As soon as the interview started, without any prompting questions from Officer Perez, N. stated, "I was going when my . . . um . . . mom's house . . . and then um he was touching like that . . . one more time . . . and then . . . and that's it, he was getting again, I was changing the TV." N. put her hand on her crotch when she said "touching like that." In somewhat disjointed fashion, she continued to explain how she was touched, and she referred to Cortez as "Arturo." At several points in the course of the interview, she made

statements such as "Tata touched me." She explained that "Tata" referred to Cortez. She made such statements in both Spanish and English. On multiple occasions, she placed her hand on her crotch to show where he touched her. When Officer Perez gave her drawings of a girl's body and asked her to circle the areas where Cortez touched her, she circled the crotch area and the buttocks area.

Officer Perez asked N. some questions to elicit her understanding of the questions and her ability to distinguish truth from fiction. N. answered these questions somewhat inconsistently, but she generally provided satisfactory answers. When asked what "gender" she was, she could not give a coherent answer. But when asked whether she was a boy or girl, she answered "girl." When asked if she was 30 years old, she could not answer. But when asked how old she was, she answered "four" and held up four fingers.

Officer Perez then asked N. if she knew the difference between the truth and a lie. N. nodded slightly in response. Officer Perez then made several factual statements in English—e.g., "you're sitting down right now," and "this door is closed,"—and asked her to state whether they were true or false. N. could not answer these questions coherently. However, Officer Perez subsequently repeated the questions again in Spanish, and N. was able to answer them correctly. When shown pictures with an outline of a girl's body, N. was able to identify various parts of the body correctly—sometimes using the Spanish terms, and sometimes using English.

Cortez moved in limine to exclude the videotaped interview on the grounds that N. was not a competent witness and her statements were not sufficiently reliable to be admitted as hearsay under Evidence Code section 1360. Cortez also requested a hearing to determine N.'s competency under Evidence Code section 405. The trial court held a hearing at which N. testified, and the court reviewed the videotaped interview. At the conclusion of the hearing, the court denied the motion to exclude the videotape. The court found that when Officer Perez asked N. why she was there, N. answered, "To tell the truth." The court further found that N. was "cogent" and "responsive." The court

acknowledged that N. did give some "fantastical run-on strange answers" but the court found she did so out of nervousness or an inability to understand the questions. Given the interview as a whole, however, the court found N. "knew why she was there" and that her statements were sufficiently reliable to meet the requirements for admissibility.

2. *Legal Principles*

"Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." (Evid. Code, § 700.) "A person is disqualified to be a witness if he or she is: (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) Incapable of understanding the duty of a witness to tell the truth." (Evid. Code, § 701, subd. (a).) As a general rule, "a hearsay declarant must be competent when an out-of-court statement is made" to have the statement admitted under one of the exceptions to the hearsay rule. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 166.) The party challenging a witness's competency has the burden to prove incompetency by a preponderance of the evidence. (*People v. Avila* (2006) 38 Cal.4th 491, 589.) "[A] trial court's determination will be upheld in the absence of a clear abuse of discretion." (*People v. Mincey* (1992) 2 Cal.4th 408, 444 (*Mincey*).) We accept the trial court's factual findings if they are supported by substantial evidence. (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.)

Evidence Code section 1360 creates an exception to the hearsay rule for certain statements made by minors under 12 describing an act of child abuse or neglect in a criminal prosecution. One foundational element requires the court, after conducting a hearing, to find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." (Evid. Code, § 1360, subd. (a)(2).) "We review a trial court's admission of evidence under section 1360 for abuse of discretion." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

3. *Admission of the Videotaped Interview Was Not an Abuse of Discretion*

Cortez challenges the admission of the videotape under Evidence Code section 701 on the ground that the record does not show N. understood she was obligated to tell the truth. Cortez points to the initial series of questions Officer Perez posed to N. concerning her ability to distinguish truth from fiction, which N. could not answer correctly. However, when the officer subsequently posed the same questions in Spanish, N. was able to distinguish the true statements from the false statements accurately. Cortez also challenges the trial court's finding that N. stated she was there "[t]o tell the truth." Cortez is correct that N. never made such a statement. However, she did physically nod her head when asked if she understood the difference between the truth and a lie. On this record, we think substantial evidence supports a finding that N. could distinguish truth from fiction and understood her duty to do so.

Cortez also challenges the admission of the videotape on the ground that N. could not express herself concerning the matter to be understood. It is true that N. often gave rambling, disjointed responses when asked what happened or what Cortez did to her. The officer asked a number of questions that appeared to flummox her, but several of these questions were poorly phrased or presented without sufficient context. N. was generally able to explain, however, that Cortez touched her inappropriately in the bedroom while they were watching television, and she repeatedly and consistently placed her hand on her crotch area to demonstrate how he touched her. She did so in both Spanish and English. And when presented with drawings showing the outline of a girl's body, N. was able to identify various parts of the body by name. Without hesitation or uncertainty, she circled her crotch and buttocks regions as the areas where Cortez touched her. The record thereby contains substantial evidence to support a finding that N. was able to express herself on the matter with sufficient clarity to be understood.

Cortez further challenges admission of the videotape on the ground that N.'s statements were not sufficiently reliable under Evidence Code section 1360. He puts

forth the same assertions he made to support the arguments above—that N.'s statements were incoherent and she did not understand her duty to tell the truth. He also points to the nonexclusive set of factors identified in *Idaho v. Wright* (1990) 497 U.S. 805 (*Wright*), concerning the reliability of child sexual abuse victims: spontaneity and consistent repetition; mental state of the declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate.

We note that *Wright*—decided 14 years before *Crawford v. Washington* (2004) 541 U.S. 36—concerned the constitutional requirements of the Confrontation Clause. Because N. testified at trial, the Confrontation Clause was not an issue in the admission of the videotape. (*Id.* at p. 59 [when a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints on the use of his or her prior out-of-court testimonial statements].) The applicability of the *Wright* factors here is therefore in question. Nonetheless, even assuming the *Wright* factors apply, they weigh in favor of admissibility. N. consistently asserted that Cortez touched her in the crotch area. She made these statements spontaneously, without prompting or leading questions from the officer. Nothing about her mental or psychological state of mind suggested she was unreliable. She used no terminology inappropriate for her age. And she had no motive to fabricate. The record thereby supports the trial court's finding of reliability.

For the above reasons, we conclude the trial court's admission of the videotaped interview of N. was not an abuse of discretion. Furthermore, admission of the evidence was not so unfair as to violate due process. (See *Perry v. New Hampshire* (2012) 565 U.S. 228 [the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair].) Accordingly, this claim is without merit.

C. *Admission of N.'s Testimony at Trial*

Cortez contends the trial court erred by admitting N.'s testimony at trial because she did not understand her obligation to tell the truth. He argues that she was therefore

incompetent to testify under Evidence Code section 701, and that admission of her testimony violated his confrontation rights under the Sixth Amendment. The Attorney General contends N. was competent to testify and that Cortez failed to object to her testimony on Sixth Amendment grounds. Cortez contends no such objection was required, but he further argues that any failure to object on Sixth Amendment grounds would have constituted ineffective assistance of counsel. We conclude N. was competent to testify, and the admission of her testimony did not violate the Sixth Amendment.

Cortez requested a pretrial hearing under Evidence Code section 405 to determine N.'s competency to testify. The trial court held such a hearing at which N. testified. She was five years old at the time. She testified that she was in kindergarten, and she was able to spell out the letters of her first name. The prosecutor then set forth several factual statements and asked N. whether they were true or false. N. correctly identified the statements as true or false and she responded affirmatively when asked if she would only tell the truth. When the prosecutor gave N. a doll, she was able to identify various parts of its body. When the prosecutor held up a cup and put a pen inside, N. was able to identify the correct positioning of the pen. On cross-examination, defense counsel asked N., "Do you understand the word truth"? N. responded, "Nope." Similarly, defense counsel asked N. if she understood the word "lie," and N. responded, "Nope." When asked, "do you know why it's important not to tell a lie," N. responded, "No." However, when counsel offered two factual propositions and asked N. to identify them as true or false, N. did so correctly. When asked to place a green pen in various positions next to a pair of cups, she did so correctly.

At the conclusion of N.'s testimony, Cortez challenged her competency as a witness on the ground that she did not understand her obligation to tell the truth. Cortez also challenged her ability to answer a question when the question was not phrased in a leading fashion. The trial court denied the motion. The court found N. was competent to

testify because she knew the difference between the truth and a lie and she understood her duty to tell the truth. The court also found her to be "cogent and responsive."

Cortez now contends the trial court erred under Evidence Code section 701 by finding her competent to testify because the record does not support a finding that she understood her obligation to testify truthfully.[10] As set forth above, some of N.'s statements demonstrated an ability to discern truth from fiction, while certain statements suggested she did not understand the meaning of those concepts. The trial court, which had the opportunity to observe N.'s conduct and behavior in the course of her testimony, credited the former statements. It is within the trial court's discretion to resolve conflicting testimony, and we must accept the court's findings if they are supported by substantial evidence. (*Mincey*, *supra*, 2 Cal.4th 444; *In re S.C.*, *supra*, 138 Cal.App.4th at p. 422.) We think the record contains substantial evidence to support the trial court's findings. Accordingly, the trial court did not abuse its discretion by finding N. competent to testify.

Nor did N.'s testimony violate the Confrontation Clause of the Sixth Amendment. Cortez argues that a witness cannot be cross-examined if she does not understand her obligation to testify truthfully. (See *Haliym v. Mitchell* (6th Cir. 2007) 492 F.3d 680, 703 [Confrontation Clause is violated if the witness is not able to understand the concept of the truth and or the duty to present truthful information to the court].) Viewing N.'s testimony in context, we think she understood her obligation to testify truthfully. She answered the prosecutor's questions correctly and dutifully; it was only on cross-examination that she became recalcitrant, and it appears that she did so out of evasion rather than misunderstanding. "Although the Confrontation Clause ' "guarantees . . . 'an opportunity for effective cross-examination,' " ' it does not entitle defendants to ' " 'cross-examination that is effective in whatever way, and to whatever extent, [they]

[10] The requirements of Evidence Code section 701 and the relevant legal principles are set forth in Section II.B.2 above.

might wish.' " ' [Citation.] In particular, it ' "includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." ' " (*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 965.) Under this standard, the admission of N.'s testimony did not violate the Sixth Amendment.[11] Cortez was free to question N. about these inconsistencies before the jury and to challenge her credibility because of them.

For the reasons above, we conclude this claim is without merit.

D. *Joinder of the Charge Involving N. with the Charges Involving J.*

Cortez contends joinder of the charge involving N. with the charges involving J. violated his constitutional right to a fair trial under the Fourteenth Amendment. The Attorney General argues that Cortez forfeited this claim by failing to move for severance; that joinder was appropriate because the charges were cross-admissible; and that lack of cross-admissibility, by itself, is not a sufficient basis for severance. Cortez argues that we may consider this claim in the absence of a motion to sever, but that any forfeiture based on a failure to move for severance below would have constituted ineffective assistance of counsel. We conclude joinder of the charges did not violate Cortez's right to a fair trial.

[11] We need not decide whether Cortez forfeited this claim by failing to object or whether the failure to do so was ineffective assistance of counsel. As our analysis demonstrates, even if counsel had objected, the trial court properly would have overruled the objection. (*People v. Anderson* (2001) 25 Cal.4th 543, 587 [defense counsel does not provide ineffective assistance of counsel by declining to lodge a futile objection].)

1. *Legal Principles*

"Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162 (*Mendoza*.) "[E]rror involving misjoinder 'affects substantial rights' and requires reversal . . . [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.' " (*U.S. v. Lane* (1986) 474 U.S. 438, 449.) The defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts. (*People v. Bean* (1988) 46 Cal.3d 919, 938-940.)

"The initial step in any review of a motion to sever is to examine the issue of cross-admissibility of evidence. Since cross-admissibility would ordinarily dispel any inference of prejudice [citations], we must inquire, had the severance motion been granted, would the evidence pertinent to one case have been admissible in the other under rules of evidence which limit the use of character evidence or prior similar acts to prove conduct [citations]." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 448 (*Williams*), superseded by statute on another ground as stated in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1229, fn. 19).) " 'If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over' effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses." ' [Citation.] Three factors are most relevant to this assessment: '(1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense. . . .' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 299.)

2. *Joinder of the Charges Did Not Render the Trial Unfair*

As an initial matter, we consider the Attorney General's argument that Cortez forfeited this claim by failing to move for severance below. Cortez relies on *People v. Simms* (1970) 10 Cal.App.3d 299, for the proposition that he may raise this claim because it resulted in "an unfairness so gross . . . as to deprive [him] of a fair trial or due process of law." (*Id.* at p. 309.) In *People v. Rogers* (2006) 39 Cal.4th 826, the California Supreme Court expressed skepticism of this position but declined to find the defendant's claim forfeited. The court held, "We need not decide whether review for gross unfairness is available in the absence of a motion to sever or an objection to joinder, for even if such review is available, gross unfairness did not result in the present case." (*Id.* at p. 851.) We will adopt the same position. Because we conclude that no gross unfairness resulted a denial of due process or the right to a fair trial, we address the merits of the claim.[12]

As Cortez acknowledges, a claim of erroneous joinder generally requires the defendant to show the charges were not cross-admissible. (*Williams, supra,* 36 Cal.3d at p. 448.) The Attorney General contends the charge of a lewd or lascivious act on N. (Count Seven) was cross-admissible with the charges of sexual assault and lewd or lascivious acts on J. (Counts One through Six) under Evidence Code section 1108. Evidence Code section 1108 provides in part that when "the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."[13] (Evid. Code, § 1108, subd. (a).) Cortez acknowledges that the charges here constituted sexual offenses under this code section, but he contends they

[12] Accordingly, we need not consider Cortez's claim that his attorney was ineffective for failing to move for severance. Any such motion would have been properly denied. (*Anderson, supra,* 25 Cal.4th at p. 587 [defense counsel does not provide ineffective assistance of counsel by declining to lodge a futile objection].)

[13] Evidence Code section 1101 sets forth the general prohibition on the use of propensity evidence to prove conduct in conformance with character.

were inadmissible because the evidence relating to them was substantially more prejudicial than probative under Evidence Code section 352.[14] He points to the cumulative nature of the charges; the inflammatory nature of the relevant evidence; the consumption of time required to prove the charges; and the relative weakness of the evidence concerning the charge as to N.

We conclude that evidence of the challenged charges was cross-admissible under Evidence Code sections 1108 and 352. First, the evidence concerning Count Seven was probative with respect to Counts One through Six, and vice versa. The evidence showed Cortez's sexual intent and motives with respect to both victims, disproving any contention that he touched them accidentally or as part of an innocent game. The evidence of intent was particularly probative given the factual similarities between Cortez's interactions with the two victims. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) And under Evidence Code section 1108, the jury could look to Cortez's commission of one sexual offense as evidence of his propensity or disposition for committing other sexual offenses. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1160 (*Villatoro*); *People v. Falsetta* (1999) 21 Cal.4th 903, 915 (*Falsetta*).)

Second, the danger of prejudice did not substantially outweigh the probative value. The evidence relating to Count Seven was not cumulative of the evidence relating to Counts One through Six, and vice versa. The charges involved distinct testimony about distinct events from at least two different witnesses. Nor was there any danger of undue consumption of time. To the contrary, joinder of the charges necessitated only one trial instead of two. And while evidence of sexual offenses is always inflammatory, we do not think the relevant evidence was unduly prejudicial in this instance. " 'The prejudice which [Section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the

[14] Evidence Code section 352 allows a trial court to exclude evidence if its probative value is substantially outweighed by a substantial danger of undue prejudice.

statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

For these reasons, we conclude the evidence relating to Count Seven was cross-admissible as to Counts One through Six, and the evidence relating to Counts One through Six was cross-admissible as to Count Seven. But even assuming the evidence was not cross-admissible, we would also conclude that "the benefits of joinder were sufficiently substantial to outweigh any possible 'spill-over' effect of the 'other-crimes' evidence." (*Jackson, supra,* 1 Cal.5th at p. 299.) None of the charges were capital offenses. And the evidence concerning Count Seven was not so comparatively weak that the totality of the evidence could have altered the outcome as to any of the charges. Accordingly, we conclude joinder of the charges did not result in "gross unfairness" amounting to a denial of due process. (*Mendoza*, *supra*, 24 Cal.4th at p. 162.)

E. *Defense Counsel's Failure to Request a Concurrent Sentence on Count Seven*

Cortez contends his trial counsel provided ineffective assistance by failing to request a concurrent sentence on Count Seven, the lewd or lascivious act upon N. The Attorney General contends the trial court would not have used its discretion to sentence Cortez concurrently on Count Seven because doing so would have left Count Eight (attempt to dissuade a witness) unpunished. We conclude Cortez did not suffer ineffective assistance of counsel because he cannot show prejudice.

1. *Procedural Background*

The probation report recommended an indeterminate sentence of 105 years to life for Counts One through Seven consecutive to a determinate term of three years for Count Eight. The report cited subdivision (d) of section 667.6 (section 667.6(d)) in support of the recommendation to impose fully consecutive sentence for each of Counts One through Seven. Section 667.6(d) mandates "[a] full, separate, and consecutive term" "for

each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." (§ 667.6, subd. (d).)

The trial court found Counts One through Seven involved separate and distinct acts of sexual assault against more than one victim. Cortez does not challenge that finding. However, while Counts One through Six charged offenses included in subdivision (e) of section 667.6, the charge in Count Seven (non-forcible lewd or lascivious act on a child) is not included in that subdivision. Section 667.6(d) therefore did not mandate a full, separate, and consecutive term for Count Seven. Thus, the trial court had the discretion to impose a sentence of 15 years to life on Count Seven concurrent with the three-year term on Count Eight, resulting in a three-year reduction in the aggregate sentence.

In calculating the aggregate sentence, it appears the trial court relied on the probation report's erroneous application of section 667.6(d) to Count Seven. Before pronouncing sentence, the court stated it had read the probation report and added, "I am inclined to follow their recommendation, which is in line with the law. And there is little, if no, flexibility." The court then imposed consecutive terms of 15 years to life for each of Counts One through Seven. In imposing the term on Count Seven, the court stated, "Count 7, is a violation of Section 288(a) of the Penal Code, with a range of 15 years to life pursuant to section 667.61(b)/(e) of the Penal Code. The court imposes 15 years to life, consecutive to any other punishment. The total term is 105 years to life *pursuant to 667.6(d) of the Penal Code*." (Italics added.) The court then imposed the indeterminate term of 105 years to life consecutive to the upper term of three years for Count Eight. Cortez made no argument or request for a concurrent term on any count.

Cortez does not dispute that the trial court had the discretion to impose all terms consecutively. He claims, however, that his trial counsel had a duty to argue that the term on Count Seven should have made concurrent. He points out that counsel had no

tactical reason not to make such an argument. He contends the failure to do so constituted ineffective assistance of counsel.

2. *Legal Principles*

To demonstrate ineffective assistance of counsel, Cortez must first show trial counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).) Second, he must show prejudice flowing from counsel's performance or lack thereof. (*Id.* at pp. 691-692.) "Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington, supra,* 466 U.S. at pp. 687-688, 693-694.) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) It is the defendant's burden on appeal to show by a preponderance of the evidence that he was denied effective assistance of counsel and is entitled to relief. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388.)

3. *Failure to Seek a Concurrent Term on Count Seven Was Not Prejudicial*

We agree that trial counsel's failure to argue for a concurrent sentence on Count Seven constituted deficient performance. "Counsel's duty at sentencing is to be familiar with the sentencing alternatives available to the court, to make sure that the court is aware of such alternatives, to explain to his or her client the consequences of the various dispositions available and to be certain that the sentence imposed is based on complete and accurate information." (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1085.) We can imagine no tactical reason not to seek a concurrent sentence, and the Attorney General does not suggest one. Rather, the Attorney General contends it would have been

futile to request a concurrent sentence. She accurately points out that section 667.6(d) required the court to impose the terms on Counts One through Six consecutive to any other term. Thus, the term on Count Seven could only have been imposed concurrent with the three-year term on Count Eight, resulting in an aggregate term of 105 years to life. The Attorney General asserts that the trial court would not have imposed such a sentence because it would have left Cortez "unpunished for his repeated efforts to have the young witnesses dissuaded from testifying."

The court made no express statement showing it intended to punish Cortez separately for Count Eight. But it is the defendant's burden to prove prejudice from trial counsel's failure to seek concurrent terms. The court's statements suggest it believed it was required to impose all terms consecutively, but nothing in the transcript of the hearing shows the court would have imposed any terms concurrently if it had known it had the discretion to do so. And Cortez points to nothing else in the record to show it is reasonably probable the court would have imposed concurrent terms. To the contrary, the court imposed the upper term of three years on Count Eight. This supports the Attorney General's contention that the court intended to punish Cortez separately for the attempted dissuasion offense. Regardless, if the court believed a lesser aggregate sentence was justified, the court could have imposed the mitigated or middle term on Count Eight. Imposing the middle term on Count Eight would have reduced the aggregate sentence by one year, but the court chose not to do so. Thus, even if we remanded for resentencing, it is unlikely the court would now choose to impose Count Seven concurrent with Count Eight, thereby reducing the aggregate sentence by *three* years.

We conclude Cortez has failed to establish a reasonable probability of a more favorable outcome. Absent any showing of prejudice, this claim is without merit.

F. *Jury Instruction Based on CALCRIM No. 1191*

The trial court instructed the jury based on CALCRIM No. 1191 as follows: "If you decide beyond a reasonable doubt that the defendant committed one or any of the charged sex offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit the other charged sex offense or offenses. [¶] If you conclude that the defendant committed one or any of the charged sex offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the other charged offenses. The people must still prove each charge and allegation beyond a reasonable doubt."

Cortez acknowledges that this instruction has been upheld as an accurate statement of Evidence Code section 1108 with respect to both charged and uncharged crimes. (*Villatoro*, *supra*, 54 Cal.4th at p. 1160; *Falsetta*, *supra*, 21 Cal.4th at p. 915.) Cortez contends, however, that the trial court erred by giving this instruction without making a determination that the danger of prejudice did not substantially outweigh the probative value of the relevant evidence under Evidence Code section 352. He further argues that the charges were not cross-admissible. Finally, he challenges the validity of *Villatoro* and contends the instruction violates his due process rights under the Fourteenth Amendment.

Cortez's arguments concerning the cross-admissibility of evidence of the various sexual offenses under Evidence Code sections 1108 and 352 duplicate his arguments with respect to joinder, discussed in Section II.D.2, above. As we explain in that section, evidence of each of the sexual offenses charged in Counts One through Seven was cross-admissible as to the other counts, and the danger of undue prejudice did not outweigh the probative value of the evidence. In any event, Cortez cites no authority for the proposition that the trial court must expressly state on the record its analysis under

Evidence Code section 352. To the contrary, a reviewing court may conclude the trial court implicitly conducted the analysis absent any such statements on the record. (*Villatoro, supra*, 54 Cal.4th at p. 1168 [court was willing to infer an implicit weighing by the trial court on the basis of record indications well short of an express statement].) We infer from the record here that the trial court applied Evidence Code section 352 and concluded the danger of undue prejudice did not substantially outweigh the probative value of the evidence.

Finally, we are bound by *Villatoro* under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 (*Auto Equity*). We perceive no grounds—constitutional or otherwise—to distinguish *Villatoro* in this case. Accordingly, we conclude this claim is without merit.

G. *Consent is Not a Defense to Lewd Conduct by Use of Force or Coercion*

With respect to Counts Five and Six (forcible lewd or lascivious acts under section 288, subdivision (b)(1)), the trial court instructed the jury, "It is not a defense that the child may have consented to the act." Cortez acknowledges that the California Supreme Court upheld this rule in *People v. Soto* (2011) 51 Cal.4th 229. Nonetheless, he argues that case was wrongly decided. We are bound to apply *People v. Soto* under *Auto Equity*, *supra*. Accordingly, we conclude this claim is without merit.

H. *Failure to Instruct on Lesser Included Offenses*

Cortez contends the trial court failed to instruct the jury on two lesser included offenses: sexual intercourse with a minor as a lesser included offense of aggravated sexual assault by rape in Counts One and Two; and sexual penetration of a minor as a lesser included offense of aggravated sexual assault by sexual penetration in Counts Three and Four. The Attorney General contends the trial court was not required to instruct on the lesser included offenses because they were not supported by substantial evidence. She further argues that any failure to instruct the jury was harmless. We conclude that, even assuming the court should have instructed the jury on the lesser

included offenses, the failure to do so was harmless because it is not reasonably probable the jury would have found favorably for Cortez on the challenged counts.

1. *Legal Principles*

A trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged only if there is substantial evidence that would absolve the defendant of the greater offense, but not the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) To determine whether a lesser offense is included in the greater offense, one of two tests must be met: The "elements test" or the "accusatory pleading test." "Under the elements test, an uncharged offense is included in a greater charged offense if the statutory elements of the greater offense include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Ngo* (2014) 225 Cal.App.4th 126, 156.) "Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citation.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.)

We apply the de novo standard of review to the failure by a trial court to instruct on an uncharged lesser included offense. (*Ibid.*) In a noncapital case, a trial court's erroneous failure to instruct the jury on a lesser included offense is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818.[15] "A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' [citation], it appears 'reasonably probable' the

[15] Cortez argues that the failure to instruct the jury on these lesser included offenses violated his federal constitutional rights, which would require us to apply the federal standard for harmless error. As he acknowledges, however, the California Supreme Court has held otherwise. (See *People v. Dennis* (1998) 17 Cal. 4th 468, 502-503.) We are bound by the high court's holding under *Auto Equity*, *supra*.

defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) This standard "requires a *reasonable* probability, not a mere *theoretical* possibility, that the instructional error affected the outcome of the trial." (*People v. Blakeley* (2000) 23 Cal.4th 82, 94.)

2. *Counts One and Two—Aggravated Sexual Assault of a Child by Rape*

Section 269, as charged in Counts One and Two, defines aggravated sexual assault of a child as rape upon a child under 14 years of age who is seven or more years younger than the defendant. (§ 269, subd. (a)(1.) As relevant here, section 261 defines rape as an act of sexual intercourse with a person not the spouse of the defendant where it is accomplished against the victim's will by force or by threatening to retaliate against the victim. (§ 261, subds. (a)(2) & (a)(6).) Cortez contends a violation of section 261.5—unlawful sexual intercourse with a minor—constitutes a lesser included offense of the charged offense. Specifically, subdivision (c) of section 261.5 prohibits sexual intercourse with a person who is not the spouse of the defendant and who is a minor more than three years younger than the defendant. Cortez is correct that if his conduct met all the elements of the greater offense except for the element of force or threat of retaliation, he would be guilty of the lesser offense under either the elements test or the accusatory pleading test. Here, the trial court instructed the jury on misdemeanor battery and misdemeanor assault as lesser included offenses in Counts One and Two, but the court did not instruct the jury on unlawful sexual intercourse with a minor as a lesser included offense. The court properly instructed the jury, however, that it could only find Cortez guilty of a lesser included offense if all jurors decided he was not guilty of the greater offense.

Cortez argues that substantial evidence would support a finding that he violated the lesser offense of unlawful sexual intercourse with a minor, but not the greater charged offense of aggravated sexual assault of a child by rape. He contends he made statements in his confession suggesting he did not use force in having sexual intercourse with J. and

that she was a willing participant. The Attorney General disagrees that the transcript provides substantial evidence sufficient to support a finding that he did not use force. She characterizes Cortez's statements as an admission that he held down J. while engaging in sexual intercourse with her.

Our review of the transcript of the confession reveals some ambiguity in this regard. Cortez made several statements suggesting he used force. He admitted that he "detained" J. during the intercourse.[16] He further admitted that he was on top of J. when his penis went inside her. But Cortez also claimed she "always wanted to do it." In her testimony, J. stated that, in the incident following her return from the swimming pool, Cortez penetrated her against her will while lying on top of her, causing her pain. As to the incident following her mother's loss of a job at the HP Pavilion, J. testified that she awoke to find Cortez on top of her. She testified that she struggled against him but he did not stop.

We need not decide whether the record contains substantial evidence to support a finding that Cortez engaged in sexual intercourse with J. without using force because it is not reasonably probable the jury would have made such a finding. First, the jury would have to reject J.'s testimony on this point. Second, the jury would have to overlook those statements by Cortez in which he admitted using force, while crediting his claims that she wanted to engage in intercourse. Furthermore, the jury would have to overlook the differences in size and age between the two parties. We do not think it is reasonably likely the jury would have done so. Accordingly, even assuming the trial court should have instructed the jury on the lesser included offense of sexual intercourse with a minor, any such error was harmless because it is not reasonably likely the jury would have acquitted Cortez on the greater offense while convicting him on the lesser offense.

[16] The Spanish word in the transcript is "*detenido*."

3. *Counts Three and Four—Aggravated Sexual Assault of a Child by Penetration*

In Counts Three and Four, the information charged Cortez with aggravated sexual assault of a child by means of penetration. Subdivision (a) of section 289 prohibits various acts of penetration against the victim's will, whether accomplished by means of force or by threat of retaliation. (§ 289, subd. (a.).) Cortez contends the trial court should have instructed the jury on the lesser included offense of sexual penetration of a minor under subdivision (h) of section 289. Under that subdivision, sexual penetration does not require the use of force or threat. The Attorney General concedes this latter offense constitutes a lesser included offense of the charged offense, but she contends the lesser offense was not supported by substantial evidence because the record shows Cortez used force.

Similar to his statements about sexual penetration, Cortez made ambiguous claims about how he penetrated J. with his fingers. At one point in the interview, he claimed he would touch her vagina when he grabbed her or threw her, suggesting he used force. At other times, he claimed it happened while they were playing a game, suggesting it was consensual. By contrast, J. consistently testified that Cortez used force. She stated that on one occasion he got on top of her while she was lying on the bed listening to headphones. When he inserted his fingers into her vagina, it caused her pain, whereupon she tried to wiggle away and hit him in the stomach. With respect to the touching incidents generally, J. also testified that Cortez was heavier, taller, and stronger than her.

For the same reasons identified above, we need not decide whether substantial evidence supported an instruction on the lesser included offense because it is not reasonably probable the jury would have acquitted Cortez on the greater charged offenses. Doing so would have required the jury to reject J.'s testimony about Cortez's use of force as well as Cortez's own statements suggesting he used force. The only evidence supporting a finding that Cortez did not use force was his own self-serving statement that the incidents occurred while they were playing a game. It is not

reasonably likely the jury would have credited these statements. Furthermore, as with the rape allegations, the jury would have to overlook the differences in size, strength, and age between the two parties. We do not think it is reasonably likely the jury would have done so. Accordingly, even assuming the trial court should have instructed the jury on the lesser included offense of sexual penetration of a minor, any such error was harmless because it is not reasonably probable the jury would have acquitted Cortez on the greater offenses while convicting him of the lesser offenses.

I. *Jury Instruction Regarding Attempted Dissuasion of a Witness or Victim*

Cortez contends the trial court erroneously instructed the jury in response to a question concerning Count Eight (attempted dissuasion). We conclude the trial court's response was not erroneous.

Count Eight charged Cortez with attempting to dissuade a victim or witness from testifying. (§ 136.1, subd. (a).) The information alleged Cortez "knowingly and maliciously attempt[ed] to prevent and dissuade [J.], a witness and victim, from attending and giving testimony at a trial, proceeding, and inquiry authorized by law." In deliberations, the jury sent a note to the court asking, "When done so by a defendant, is telling a witness what to do (truthfully or not) in a [*sic*] testimony, a malicious act?" The parties stipulated to the following response by the court: "There is no requirement that the defendant be truthful. There is no requirement that the defendant [be] untruthful. Whether truthful or not, a person acts maliciously when he either: intends to annoy, harm, or injure someone else in any way or intends to interfere in any way with the orderly administration of justice. It is up to you to decide if there was malice, based on the definition of 'acts maliciously.' " The court then directed the jury to re-read CALCRIM No. 2622, which sets forth the elements of the offense.

"The court has a primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) "Although no particular jury instructions are required, the court has a duty to ensure that the instructions provide a

complete and accurate statement of the law." (*People v. Ramirez* (2015) 233 Cal.App.4th 940, 949.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on other grounds by *People v. Reyes* (1998) 19 Cal.4th 743.) If the charge as a whole is ambiguous, we consider whether there is a "reasonable likelihood" the jury misapplied the instruction. (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

Cortez does not argue that the trial court misstated the law. Rather, he claims the jury could have misunderstood the court's response to mean that the issue of whether he intended to cause J. to be truthful was immaterial to deciding whether he acted maliciously. For the reasons below, we find no merit in this contention.

As an initial matter, we note that Cortez forfeited this claim by stipulating to the trial court's response. (*People v. Harris* (2008) 43 Cal.4th 1269, 1317 [defendant waived claim by specifically agreeing to trial court's handling of jury question]; *People v. Rogers*, *supra*, 39 Cal.4th at p. 877 [counsel's acquiescence to court's response to jury question forfeited claim on appeal].) Nonetheless, nothing in the trial court's response misstated the law. Cortez cites no authority for the proposition that a defendant must be untruthful or cause a witness to be untruthful to be guilty of attempted dissuasion. Under the plain language of the statute, it is sufficient if the defendant knowingly and maliciously attempts to prevent or dissuade the witness or victim from testifying. (§ 136.1, subd. (a)(2).) Section 136 defines "malice" to include, among other things, the intent to interfere in any way with the orderly administration of justice. (§ 136, subd. (1).) The instructions on these elements were included in CALCRIM No. 2622, to which the trial court directed the jury's attention.

Viewing the instructions as a whole, we conclude the trial court properly instructed the jury in accordance with the above principles. The trial court's instructions

were also unambiguous; it is not reasonably likely the jury misapplied the instructions as Cortez contends. Accordingly, this claim is without merit.

J. *Cumulative Prejudice*

Cortez contends we must reverse his conviction based on cumulative prejudice from multiple errors. We find no errors, so there is no prejudice to cumulate. In Section II.H, we declined to decide whether the trial court erred by not instructing the jury on lesser included offenses in Counts One through Four. But even assuming the trial court erred in that regard, we would find no cumulative prejudice because there is no reasonable probability the jury would have reached a more favorable outcome in the absence of the asserted error. Accordingly, this claim is without merit.

III. DISPOSITION

The judgment is affirmed.

_____
WALSH, J. *

WE CONCUR:

_____
RUSHING, P.J.

_____
PREMO, J.

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*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.